In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1779

RICHARD A. BUBLE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner was indicted and convicted in the United States District Court for the Central District of California on two counts of willfully and knowingly attempting to evade income taxes for the calendar years 1963 and 1964, in violation of Section 7201 of the Internal Revenue Code of 1954 (26 U.S.C.). He was fined $5,000 and placed on probation for three years. The court of appeals affirmed *per curiam* (Pet. App. 1A-2A).

The single complaint here is that the district judge committed reversible error by altering certain language in the indictment. As returned by the grand jury, the indictment (see Pet. App. 5A-6A) charged that "on or about the 15th day of April, 1963, * * * defendant * * * did wilfully and knowingly attempt to evade and defeat a large part of the income tax due and owing * * * for the calendar year 1963, by filing * * * a false and fraudulent joint income tax return * * *" (Count One); and that "on or about the 15th day of April, 1964, * * * defendant * * * did wilfully and knowingly attempt to evade and defeat a large part of the income tax due and owing * * * for the calendar year 1964, by filing * * * a false and fraudulent joint income tax return * * *" (Count Two). After the jury was impaneled but before the government commenced its case, the district judge altered the "on or about" dates in the indictment, to reflect that the returns were filed on or about April 15, 1964 and 1965, respectively (Pet. App. 1A).

Petitioner argues here, as he did in the court below, that the alterations materially changed the charge against him and thus denied him the Fifth Amendment guarantee to "a presentment or indictment of a Grand Jury." The court of appeals rejected this contention; it held that the alteration was properly made since "[o]bviously the literal figures [dates] made no sense," and that in any event petitioner was not prejudiced thereby because the government could have proved the correct dates even under the original indictment language (Pet. App. 1A, 2A). In the circumstances of this case, this ruling is correct, and further review is unwarranted.

1. The asserted conflict (Pet. 13) with *Ex parte Bain*, 121 U.S. 1; *Stirone* v. *United States*, 361 U.S. 212; and *Russell* v. *United States*, 369 U.S. 749, does not exist. Those cases stand for the proposition that an indictment may not be altered to change materially the nature and substance of the offense charged, except on resubmission to the grand jury. But that is not the situation in this case. Here, "the change is merely a matter of form" to correct a clerical-type mistake, and thus could properly be made by the judge without resubmission. *Russell* v. *United States*, *supra*, 369 U.S. at 770. The correction of the dates did not enlarge or change the nature of the crime charged in the indictment (see *Sansone* v. *United States*, 380 U.S. 343), and hence was not error. See *Stewart* v. *United States*, 395 F. 2d 484 (C.A. 8); *Heisler* v. *United States*, 394 F. 2d 692 (C.A. 9), certiorari denied, 393 U.S. 986; *Dye* v. *Sacks*, 279 F. 2d 834 (C.A. 6).

2. At all events, the alteration was not prejudicial to petitioner, since even without it the government could have proved the correct dates. The essence of the charges as set forth in the original indictment was that petitioner willfully and knowingly attempted to evade his income tax liabilities "for the calendar year 1963" and "for the calendar year 1964." The tax liabilities for those years accrued only after each year ended. This is a matter of common knowledge. As the court below noted, petitioner "really knew what years were involved" (Pet. App. 2A). The court thus correctly concluded that a variance in proof under the original indictment with respect to the er-

roneous dates still "could have permitted the case to go to the jury" (*ibid.*). See *United States* v. *Ragen*, 314 U.S. 513, 526. In this circumstance, any error in making the alteration did not affect "substantial rights" and was therefore properly disregarded. Rule 52(a), Federal Rules of Criminal Procedure.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JULY 1971.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1971 429649 749